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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1712~~ 70-173

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL,
Respondents.

REPLY OF PETITIONERS TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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Petitioners, pursuant to Rule 24.4 of this Court, address the following memorandum on a relevant writ granted since the filing of the petition and the following reply to arguments first raised in the brief in opposition to the Petition.

I.

Certiorari Has Been Granted in The Closely Related Trucking Unlimited vs. California Motor Transport Co. Case

On June 1, 1971, this Court granted a writ of certiorari to the Ninth Circuit in the case which is now styled in this court, California Motor Transport Co. v. Trucking Unlimited, No. 1419, October Term 1970. The opinion of the Court of Appeals is found at 432 F.2d 755. That case is one in which, as here, the Court of Appeals has made serious inroads upon the law as declared by this Court concerning the status of governmental action under the antitrust laws and involves one of the same questions raised in the petition at bar. The Ninth Circuit decision was relied upon by the Fifth Circuit in the present case.

Respondents here rely upon the opinion of the Ninth Circuit asserting that the trial court there, in dismissing the case because of the application of the *Noerr-Pennington* rationale, had noted that there were no allegations that any false, misleading or insupportable representations had been made to the governmental agencies which were concerned in that case. Respondents argue that the allegations of false nominations to the Railroad Commission in the case at bar makes this even a stronger case against application of the *Noerr-Pennington* rationale. The Court will recall, however, that *Noerr* and *Okefenokee,* which was approved by this Court in *Pennington,* expressly hold that even false representations concertedly made for the purpose of procuring governmental action which is detrimental to competition cannot form the basis for antitrust liability.

Indeed, the Ninth Circuit in *Trucking Unlimited* viewed the case at bar as being properly within the application of the *Noerr-Pennington* rule even though it did not so regard the case before it. The Ninth Circuit indicated approval of the trial court's partial summary judgment in the instant case which it equated with Okefenokee stating in footnote 7 at 432 F.2d 760 as follows:

> "In Okenfenokee Rural Elec. Membership Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954), and Woods Exploration & Prod. Co. v. ALCOA, 284 F. Supp. 582 (S.D. Tex. 1968), the only injury alleged resulted from valid governmental action."

The matter of the impact of the antitrust laws upon the many ways in which joint action may be taken by citizens, both real and corporate, to bring about governmental action at whatever level, whether local, state or federal and whether legislative, executive, or judicial, or administrative, is one with ramifications of great magnitude and importance not just to the entire business community but also to the right of all citizens to petition to government and the functioning of government at all levels. It is respect-

fully urged that this Court grant the writ to prevent the erosion of the salutary principles laid down in *Noerr, Pennington,* and *Okefenokee,* and consider this case along with the Ninth Circuit case which it is to hear.

II.

Fraudulently Procured Patents Are Not Analogous To The Case At Bar.

It is easily demonstrated that the reliance of Respondents and the court below upon *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.,* 382 U.S. 172 (1965), is entirely misplaced. In that case this Court reversed the dismissal of a counterclaim which asserted a violation of § 2 of the Sherman Act based upon an allegation, taken to be true, that a patent which the Plaintiff had sought to enforce against the defendant had been obtained from the Patent Office by deliberate fraud. This Court held that the procurement of a patent by deliberate fraud would strip the patentee of its protection from the application of antitrust by the lawful patent monopoly. This Court went on to hold, moreover, that obtaining a patent by fraud does not necessarily create a per se violation of the antitrust laws and that where monopolization or attempt to monopolize are charged, a plaintiff must show that the party charged has the requisite exclusionary power in a properly defined relevant market so as to measure the effect upon competition.

Walker Process and similar cases lend no support to Respondents' position because the exemption of the monopoly from the antitrust laws was entirely dependent upon the patent and the lawful monoply created thereby. When the patent was invalidated because of fraud in its procurement, the monopoly losts its exempt status. No parallel or analogous situation exists here. Respondent Woods did not seek to invalidate the gas production allowables based upon the alleged false producers' forecasts of Petitioners

as could have been done. Woods made no effort to bring the matter or producers' forecasts or allowables to the attention of the Railroad Commission nor did he seek relief from the allowable production orders of the Commission in the courts of the State of Texas as he was permitted to do. Sec. 24, Art. 6008, Tex. Rev. Civ. Stat., Appendix p. 152. As pointed out at pages 21 and 22 of the petition, the Railroad Commission was fully cognizant of all that transpired in the Appling Field and the effect of its allowable production orders. Until those orders were invalidated under the procedures provided by the statutes of Texas, they remained valid and subsisting. Such valid orders are directly within the rule of *Parker* v. *Brown/Noerr-Pennington* so that any injury to Respondents suffered as a result of such orders is not compensable under the antitrust laws.

III.

The Jury Made No Finding Whatever Concerning The Relevant Market.

The argument of Respondents that the issue as to the relevant market was submitted to the jury by the definition of moncpoly in the charge of the court and in the wording of special interrogatory No. 2 is sheer sophistry, which completely perverts the record. The trial court, in its charge, did define the word "monopolize" as quoted at page 24 of Respondents' brief. However, immediately following that definition the court proceeded to instruct the jury that:

> "The offense of monopoly under Section 2 of the Sherman Antitrust Act has two elements:
>
> (1) The possession between defendants of monopoly power *in the relevant market, in this case the production, transportation and marketing of gas out of the Appling Field,* and
>
> (2) The willful acquisition or maintenance of that power is distinguished from growth or development

as a consequence of a superior product, business acumen, or historic accident." (Tr. 3308).

The interrogatory submitted to the jury inquired:

> "Did Alcoa and Crown monopolize or attempt to monopolize or conspire with F. E. Appling, Carl E. Siegesmund, or Houston Pipe Line Company, or anyone of them, or either of them, to monopolize any appreciable part of the trade and commerce of *drilling for, producing, and transporting gas from the Appling Field?*" (Appendix p. 41). [Emphasis supplied].

Thus, it is clearly seen that the trial court did not attempt to define for the jury what is meant by "relevant market" nor did it submit any issue to the jury which would elicit a finding from the jury on the areal extent of the relevant market or as to whether the Appling Field was in fact a relevant market. The charge to the jury on the contrary instructed them that "production, transportation and marketing of gas out of the Appling Field" constituted the relevant market as a matter of law. The Court of Appeals, in effect, reinstates the erroneous submission to the jury. As pointed out in II of the argument in the Petition, the Appling Field is not a market at all, either relevant or irrelevant, and in the absence of proof of unlawful economic power in any market, Petitioners are entitled to judgment or, at the very least, Petitioners are entitled to a determination by a jury as to the true extent of the area in which their market power is to be tested or as to whether the Appling Field is in fact a relevant market.

IV.

The Court of Appeals Did Not Remand Simply for a Trial of Damage Issues.

Respondent asserts in part III that the verdict of the jury disposed of any question as to the liability issue in the case and that the Court of Appeals remands only for a determination of whether or not the Petitioners filed false "nominations" and, if so, the amount of damages suffered

by Respondents as a result thereof, and for determination of the amount of damages suffered by reason of Respondents' failure to proceed with plans for a liquid extraction plant. This is not what the Court of Appeals has ordered. In its opinion dated March 17, 1971, on the petition for rehearing and petition for rehearing en banc, the Court of Appeals said, construing its own prior opinion:

> "Appellees' argument to the contrary notwithstanding, we think our opinion clearly states that the trial on remand with regard to the alleged filing of false nomination forecasts shall encompass all those issues which are associated with antitrust actions." (Appendix p. 96).

Thus, it seems clear that the Court of Appeals, at least as to matters pertaining to the alleged filing of false producers forecasts, directs a full trial including issues as to whether or not Petitioners have committed any violation of the Sherman Act with respect to this aspect of the case. Indeed the opinion below must be subject to the same interpretation as to the failure of Respondents to realize their alleged hopes for the construction of a liquids extraction plant because this part of the case and the evidence as to it has never been submitted to or passed upon by the jury.

The apparent trifurcation of this case by the Court of Appeals is improper for two compelling reasons. First, if the facet of the case dealing with nominations is so distinct that it may be tried separately as a separate cause of action on both issues of liability and damages, it is the only portion of the case upon which Respondents should ever have been able to proceed. This is so because the claims concerning nominations were the only claims asserted in the suit until the claims concerning the construction of the pipeline, for which the jury found damages, and the claims concerning a liquids extraction plant were added in the second amended complaint, after the statute of limitations had run.

Second, a necessary element of a claim under the antitrust laws is injury to the plaintiff. The injury suffered must be the proximate result of the unlawful conduct. If this case is actually a single cause of action, none of which is time barred, the alleged liability creating conduct is completely interwoven with the claims of injury and damage. The jury which brought in the verdict which the Court of Appeals would reinstate did not hear evidence as to the real effect of regulation of production by the Railroad Commission, i.e., that Respondents were allowed to drain away and confiscate vast quantities of Petitioners' gas. Nevertheless, the total effect of such regulation and resulting drainage would be a necessary part of the *whole case*, including the portion of the case which was tried and as to which the Court of Appeals sought to award damages. A jury which hears all of the evidence could well conclude that Respondents have suffered no injury whatever on the whole case or any part of it.

Such a situation is governed by the express holding of this Court in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U.S. 494, 500 (1931), stating the rule governing partial new trials to be:

> "Where the practice permits a partial new trial it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. See Norfolk Southern R. Co. v. Ferebee, 238 U.S. 269, 274; American Locomotive Co. v. Harris, 239 Fed. 234, 240; Simmons v. Fish, supra, p. 568; McBride v. Huckins, 76 N.H. 206 213; 81 Atl. 528; General Motors Co. v. Shepard Co., 47 R. I. 153, 156; 130 Atl. 593; LeFebvre's Administrator v. Central Vermont Ry. Co., 97 Vt. 342, 358; 123 Atl. 211. Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial."

Petitioners urge this Court to condemn this fragmentation of this case into three parts on both liability and damage issues as a radical departure from the rulings of this Court and accepted practice.

V.

Respondents Have Not Been Injured In Their "Business or Property."

The verdict based on the alleged lost pipeline contract, which the Court of Appeals would reinstate, and the additional damages which it would allow on a trial of issues concerning the alleged loss of a liquids extraction plant contract have no legal foundation because loss of such alleged contracts do not constitute injury to "business or property" under the antitrust laws. This is so because the claimed contract with Lumar for shared pipeline facilities and a possible shared liquids extraction plant was found by the jury to be a forgery. Alleged oral agreements between Woods and Garver Oil & Gas Equipment Company, Marler Construction Company and Sinclair Oil & Gas Company, referred to at page 15 of Respondents' brief, would fall within the proscriptions of the statute of frauds as would the nonexistent agreement with Lumar or any claimed oral agreement with Lumar preceding the forged contract. Such entirely inchoate and unenforceable arrangements, hopes, or plans do not rise to the level of "business or property." In *Martin* v. *Phillips Petroleum Company*, 5 Cir., 365 F.2d 629, cert. den., 385 U.S. 991, rehearing den., 386 U.S. 930, a similar situation was before the court below. There the court held that neither an agreement which was a nullity under the applicable statute of frauds nor inchoate negotiations constituted business or property within Section 4 of the Clayton Act, 15 U.S.C. § 15. In its opinion in the case at bar the Court of Appeals seeks to distinguish its prior holding in *Martin* on the evidence. Petitioners, nevertheless, are confident that if the writ is granted they can demonstrate that there was insufficient evidence to

allow the jury to speculate upon the degree of preparedness of Respondents to enter the business of owning and operating a liquid extraction plant and that the trial court correctly followed controlling precedent in refusing to submit the matter to the jury.

CONCLUSION

To allow the decision of the Court of Appeals to stand would be to perpetuate a miserable miscarriage of justice which would undermine this Court's holdings in *Parker* v. *Brown* and *Noerr-Pennington*, eviscerate the antitrust laws of a meaningful statute of limitations, allow piecemeal trials of a fragmented case preventing Petitioners from ever obtaining a fair trial upon the entire case contrary to the law as announced by this Court, and judicially reward the Respondents pillage of Petitioners' Appling Field gas reserves with treble damages never actually incurred.

The petition should be granted and the decision of the trial court restored.

Respectfully submitted,

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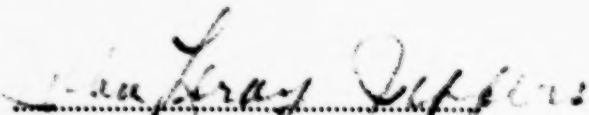
CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33, paragraph 1, of this Court, three copies of the foregoing Reply of Petitioners to Brief in Opposition to Petition for Writ of Certiorari were served upon Counsel for Respondents by placing the same in the United States mail, first class postage prepaid addressed to counsel of record for Respondents at his post office address this 4 day of August, 1971, thus serving all parties required to be served.



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